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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1007

BENJAMIN COHEN,

Petitioner,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioner
2201 Collins Avenue
Miami Beach, Florida

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CENTRAL NATIONAL BANK OF JACKSONVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner BENJAMIN COHEN respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 12, 1970.

OPINIONS BELOW

On August 29, 1969 the United States District Court for the Middle District of Florida, Jacksonville Division entered its Declaratory Judgment. A copy of the opinion appears in Appendix D. The opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 13, 1970. On November 16, 1970 Mr. Justice Black entered an order granting until and including November 25, 1970 for filing petition for a writ of certiorari, without prejudice to the Court's consideration as to whether the application was filed in time. A copy of the order extending time to file petition for writ of certiorari appears in Appendix F. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

WHEN A FLORIDA STATUTE REQUIRES TEN DAYS' NOTICE TO BE GIVEN BEFORE SECURITIES HELD AS COLLATERAL ARE SOLD BY A BANK, DO THE FLORIDA RULES OF CIVIL PROCEDURE APPLY TO REQUIRE AN ADDITIONAL THREE DAYS' NOTICE WHEN NOTICE IS SENT BY REGISTERED MAIL, TO INSURE DUE PROCESS AND EQUAL PROTECTION OF LAW?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

UNITED STATES CODE TITLE 28 SECTION 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

FLORIDA STATUTE 685.02 (repealed effective January 1, 1967)

"SALE OF COLLATERAL SECURITIES. In all cases in which any stock in a corporation, contract, obligations, security or evidence of indebtedness, shall be pledged or deposited as security for the payment of any indebtedness, the person or corporation to whom the same may be pledged, hypothecated or transferred, and their assigns, may sell the same in such manner and on such terms as may be agreed upon in writing by the parties at the time of making the pledge, or thereafter, and such sale shall vest in the purchaser or purchasers the title in and to said pledges, collaterals or securities; provided ten days' notice of said sale be given to the pledgor or his legal representative by personal delivery or by registered mail addressed to the pledgor at the address given by him to the pledgee for that purpose, such period of notice to begin to run from the date of such personal delivery or from the date of posting if such notice is given by registered mail . . ."

RULE A, FLORIDA RULES OF CIVIL PROCEDURE (1954)

"These rules are applicable to all suits of a civil nature and all special statutory proceedings in the Circuit Courts, County Judge's Courts, County Courts, and Civil Courts of Record, whether recognizable as cases at law or in equity, with the exception that the form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes providing for such proceedings, unless these rules shall specifically provide to the contrary. These rules shall be construed to secure the just, speedy and inexpensive determination of every action."

RULE 1.6 (e), FLORIDA RULES OF CIVIL PROCEDURE 1954

"Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

CONSTITUTION OF THE UNITED STATES — AMENDMENT XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF FLORIDA, 1968 REVISION

ARTICLE 1—DECLARATION OF RIGHTS—SECTION 2

BASIC RIGHTS—All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.

ARTICLE 1—DECLARATION OF RIGHTS—SECTION 9

DUE PROCESS—No person shall be deprived of life, liberty, or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

STATEMENT OF THE CASE

Petitioner, Benjamin Cohen, filed Complaint for Declaratory Judgment and Other Relief (App. A), and Amended Complaint for Declaratory Judgment and Other Relief (App. B). In his action filed in the United States District Court for the Middle District of Florida, Jacksonville Division, Petitioner sought a declaration that a notice of sale of collateral in the form of securities sent him by defendant by registered mail was invalid. Petitioner contended that Florida Statute 685.02, 1965, which required ten days' notice of sale, actually required that thirteen days' notice be given prior to the sale of securities held as collateral when notice was served by mail. Jurisdiction was invoked by virtue of diversity of citizenship of the parties and the amount in controversy exceeding ten thousand dollars ($10,000.00). Petitioner is a resident of New York City, New York, and Defendant is a banking institution chartered under the laws of the United States of America with its principal place of business in Jacksonville, Florida. Relief was sought under the provisions of the Federal Declaratory Judgment Act.

The parties entered a pre-trial stipulation stating that the purpose of the action was to determine the validity of the notice of sale given by the Defendant to the Plaintiff regarding the sale of securities held as collateral, under Florida Statute 685.02, 1965, then in existence, Plaintiff had executed and delivered his notes payable to the Defendant Bank in the sum of one hundred thousand dollars on September 3, 1964, Plaintiff had executed a collateral pledge agreement, pledging with the bank as security for repayment of the loan, six thousand two hundred and fifty shares of Bank of Miami Beach stock.

The parties stipulated to facts admitted and requiring no proof at trial, including that ten days' notice of sale by registered mail was given by Defendant to Plaintiff and thirteen days' notice of sale was not given by Defendant to Plaintiff. The notice of sale appears in Appendix A as an exhibit to the Complaint.

The court entered Declaratory Judgment (App. D) denying Petitioner the relief sought on the ground that the Florida Rules of Civil Procedure were intended to apply only to parties to judicial proceedings.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed the decision of the trial court (App. E). The Appellate Court held that the Rules of Civil Procedure could not have any application to the sale of pledged collateral, which it held to be a non-judicial proceeding.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the decision of the United States Court of Appeals for the Fifth Circuit and the decision of the United States District Court for the Middle District of Florida have decided a Federal question in a way in conflict with applicable decisions of this court and constitute a departure from the accepted and usual course of proceedings on an important question of Federal law.

The Appellate Court held that the Florida Rules of Civil Procedure did not apply to sale of pledged collateral, which it found to be a non-judicial proceeding. Petitioner contends that unless the Florida Rules of Civil Procedure

apply, the statute as written constitutes a deprivation of equal protection of law since it treats persons similarly situated differently.

According to Florida Statute 685.02, 1965, a recipient of notice by mail receives less notice than does a recipient of notice by personal delivery.

Florida Statute 685.02, 1965, states in pertinent part:

"685.02 SALE OF COLLATERAL SECURITIES. In all cases in which any stock in a corporation, contract, obligations, security or evidence of indebtedness, shall be pledged or deposited as security for the payment of any indebtedness, the person or corporation to whom the same may be pledged, hypothecated or transferred, and their assigns, may sell the same in such manner and on such terms as may be agreed upon in writing by the parties at the time of making the pledge or thereafter, and such sale shall vest in the purchaser or purchasers the title in and to said pledges, collaterals or securities; provided ten days' notice of said sale be given to the pledgor or his legal representative by personal delivery or by registered mail addressed to the pledgor at the address given by him to the pledgee for that purpose, such period of notice to begin to run from the date of such personal delivery or from the date of posting if such notice is given by registered mail. . . ."

Rule 1.6(e) of the 1954 Florida Rules of Civil Procedure states:

> "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period".

If the foregoing Rule of Civil Procedure applies to Florida Statute 685.02, thirteen days' notice would have been required of defendant instead of ten days' notice.

Rule A of the Florida Rules of Civil Procedure, 1954, announces the scope of the rules. The rules are applicable to special statutory proceedings as well as to law suits in court and the time for pleading in all special statutory proceedings is prescribed by the statute unless the rules specifically provide to the contrary. In the case at bar, the rule enlarges the time required by the Statute.

In addition the Supreme Court of Florida, on June 20th, 1962 filed its Order, as it did on July 28, 1965, providing that all statutes not superseded by the Florida Rules of Civil Procedure remain in effect but those in conflict or inconsistent with the amendments to the rules are repealed.

In its Declaratory Judgment, the trial court stated that the Supreme Court of Florida certainly did not mean to interfere with regulations established by the Florida Legislature for such non-judicial proceedings as the sale of collateral securities. With that position plaintiff cannot agree and contends that the trial court was in error.

The provision for additional time to act in response to a notice received by mail is a matter of essential justice in conformity with due process of law requirements. The same need exists in acting in response to a statutory proceeding as exists in acting in response to a rule-enlarged proceeding. Great injustice would be done if the Court were to hold otherwise, and denial of equal protection of law would result.

Florida Statute 685.02 specifically provides that ten days' notice of sale be given by "personal delivery or by registered mail . . . such period of notice to *begin to run* from the date of such personal delivery or from the date of posting if such notice is given by registered mail . . ." (Emphasis supplied).

Thus it is clear that a person receiving a notice personally delivered in accordance with the statute is being given a greater period of notice and time to act in response. Because the period of notice begins to run from the date of personal delivery, a person to whom the notice is *delivered* has ten days *subsequent to the delivery* within which to take action prior to the sale of securities.

The person to whom registered mail delivered the notice, may possibly not receive that notice for several days; nevertheless the time starts running on the day of the posting. Thus, the person receiving the notice by mail is being deprived of equal protection of law if the statute is construed according to the decision of the trial court as affirmed.

To state the matter another way, when notice is delivered rather than mailed, the time commences to run

upon receipt of the notice; whereas if the notice is mailed, the time runs from the mailing. Thus, a person to whom the notice has been mailed cannot possibly have ten days' actual notice as is afforded a person to whom the notice is delivered. It is improper to hold that the Legislature intended to deprive persons in non-judicial proceedings of equal protection of law or of due process of law. Therefore, the alternative is to hold that the Legislature intended the time to respond to a notice of sale to be available equally for both types of notice recipients, and that the three day extension applicable under the Rules of Civil Procedure, is applicable to statutory proceedings, and to Florida Statute 685.02. The recipient should have ten days within which to take action, no matter what method is used to convey notice, if the Legislature intended to provide for ten days' notice.

In *United States to the Use of Engineering and Equipment Company v. W. B. Wyatt*, 174 F. Supp. 260 (U.S. Dist. Ct. N.D. Fla., 1959), the Court held that the Federal Rules of Civil Procedure were applicable to the Miller Act relating to the computation of period of time for filing notice pursuant to the statute. That case indicates that at least in certain Federal statutory proceedings, the Federal Rules of Civil Procedure do apply. Petitioner contends that under diversity jurisdiction the Federal Court has the power to interpret the state statute under the same rules it would use to interpret the Federal Statute, and thus the procedure established in the case under the Miller Act would apply in the case before this Court. Under that theory the Florida Rules of Civil Procedure would be used to apply to the statute under consideration here, namely the statute giving notice prior to the sale of collateral securities.

In *Tibbetts v. Olson* 108 So. 679 (Fla. 1926), Justice Whitfield, in his concurring opinion, stated "The Constitution is designed to prescribe and limit governmental powers and to secure individual rights against unlawful invasion by public officers or by private parties. . . . The state has power to determine by what process and procedure legal rights may be asserted and determined, provided the procedure adopted as applicable to the particular case does not arbitrarily and unjustly discriminate so as to deny to a party the equal protection of the laws, and does afford reasonable notice and a fair opportunity to be heard before rights are decided, so as not to deprive any person of life, liberty, or property without due process, in violation of organic law." . . .

If the Florida statute regarding notice of sale required in cases in which collateral securities are sold is interpreted in the manner upheld by the decision of the United States Court of Appeals for the Fifth Circuit, Petitioner will be permanently deprived of his rights to equal protection of law and to due process of law. It is respectfully submitted that the Fifth Circuit opinion in this case, based upon diversity of citizenship, should afford Petitioner the same rights as would be afforded a Petitioner under the Miller Act or any other case where the Rules of Civil Procedure are used to retain Constitutionality of a Statute whose language appears to destroy that right.

The Florida Rules of Civil Procedure 1954 are applicable to statutory proceedings as well as to law suits in court, it is submitted.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioner
2201 Collins Avenue
Miami Beach, Florida

By _____
Natalie Baskin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to Rogers, Towers, Bailey, Jones and Gay, 1300 Florida Title Building, Jacksonville, Florida 32202, Attention: James M. McLean, Esq., this 24th day of November, 1970.

Natalie Baskin

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

CASE NO. 66-516-Civ-J

BENJAMIN COHEN,

Plaintiff,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE, a National Banking institution chartered under the laws of the United States

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT and OTHER RELIEF

COMES NOW the Plaintiff, BENJAMIN COHEN, by his undersigned attorney, and files this his complaint against the Defendant, CENTRAL NATIONAL BANK OF JACKSONVILLE and says:

I.

Plaintiff is a resident of New York City, New York. Defendant is a banking institution chartered under the laws of the United States of America, with its principal place of business in Jacksonville, Florida.

II.

The jurisdiction of this Court is invoked by virtue of the citizenship of the parties and the fact that the amount involved in this controversy is in excess of $10,000.00.

III.

Relief is sought under the provisions of the Federal Declaratory Judgment Act.

IV.

On September 3, 1964, Plaintiff executed and delivered his note payable to the Defendant in the amount of $100,000.00. At that time Plaintiff executed a Collateral Pledge Agreement under the terms of which he pledged with the Bank as security for the repayment of the loan, 6,250 shares of Bank of Miami Beach stock, and in particular, Certificates Nos. A 1085-1097, inclusive.

V.

Thereafter, in an undated Notice of Sale, the Defendant sought to cause the sale on Tuesday, July 19, 1966, at the desk of Wayne Puls, President of the Defendant banking house, of the described certificates representing shares of stock of the Bank of Miami Beach.

A copy of that Notice is attached hereto as Exhibit "A" and made a part of this Complaint.

It is the obvious contention of the Defendant that the Notice of Sale is proper and will cause good title to be invested in the purchaser of the stock certificates at that sale.

VI.

It is the contention of the Plaintiff that the purported Notice of Sale was invalid in that the Noice and the mailing of the Notice failed to comply with the provisions of the Florida Statutes relating to the sale of collateral securities, which statute is Florida Statute 685.02, Laws of 1965.

Plaintiff contends that Defendant well knew that service to him through the mail could not reach him in time to permit the period prescribed by Florida Satute 685.02 to be available to Plaintiff prior to the proposed date of sale. The Notice of Sale appended hereto as Exhibit "A" did not in fact reach Plaintiff within the requisite time.

VII.

Plaintiff contends, contrary to the contention of the Defendant as reflected in its Notice of Sale, that the notice is improper under the Statute, is invalid under the Statute and, therefore, cannot permit the vesting of good title to the stock certificates at the sale.

VIII.

As a result of the difference in the position of the parties, Plaintiff is in doubt as to his rights and status under the said Notice of Sale and seeks a declaratory decree of this Court declaring that the Noice of Sale is invalid and that good title to the stock certificates cannot be secured from that sale.

Inasmuch, therefore, as Plaintiff is without relief save and except in a Court of equity, Plaintiff prays:

1. That this Court take jurisdiction of this cause and of the parties herein.

2. That this Court declare by its appropriate decree that the Notice of Sale reflected in these proceedings is invalid and fails to conform to the requirements of Florida Statute 685.02.

3. That this Court grant such other and further relief as it may deem meet and proper.

Milton E. Grusmark
Attorney for Plaintiff
407 Lincoln Road
Miami Beach, Florida 33139

EXHIBIT "A"

Law Offices

NORMAN P. FREEDMAN
1005 Florida Title Building
110 West Forsyth Street
Jacksonville, Florida 32202

Norman P. Freedman
Fredrick L. Rice

Telephone
Elgin 4-1422

NOTICE OF SALE

Re: Note of BENJAMIN COHEN, endorsed by Philip E. Simon, dated September 8, 1964, payable on demand — Original Amount $100,000.00. Balance due $64,000.00 plus interest.

You are hereby notified that the Central National Bank of Jacksonville has elected to declare the entire balance of the promissory note described in the caption to be presently due and owing.

You are further notified that the Bank will sell the collateral described in said note (6250 shares of Bank of Miami Beach stock — Certificates Nos. A1085-A1097, inclusive) at private sale, to the highest bidder, for cash, at the hour of 10:00 o'clock, A.M., Tuesday, July 19, 1966 at the desk of Wayne Puls, President, in the banking house of this Bank at the corner of Julia and Duval Sreets, in Jacksonville, Florida. You are hereby invited to produce bidders at such sale. This Bank reserves the right to make

bids at such sale and further reserves the right to reject all bids for an amount less than the balance of the indebtedness due this Bank.

/s/Norman P. Freedman

NORMAN P. FREEDMAN
Attorney for Central National
Bank of Jacksonville

Copies to:
Mr. Benjamin Cohen
Mr. Philip E. Simon
Mr. Jules Sokoloff
Bankshares Investments, Ltd.
Bankshares International, Ltd.
Dubbin, Schiff, Berkman & Dubbin
Mr. Marvin W. Lewis

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

CASE NO. 66-516-Civ-J

BENJAMIN COHEN,

Plaintiff,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE, a National Banking institution chartered under the laws of the United States,

Defendant.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

COMES NOW the Plaintiff, BENJAMIN COHEN, by his undersigned attorney, and files this his Amended Complaint for Declaratory Judgment and Other Relief against the Defendant, CENTRAL NATIONAL BANK OF JACKSONVILLE, and says:

I.

Plaintiff is a resident of New York City, New York. Defendant is a banking institution chartered under the laws of the United States of America, with its principal place of business in Jacksonville, Florida.

II.

The jurisdiction of this Court is invoked by virtue of the citizenship of the parties and the fact that the amount involved in this controversy is in excess of TEN THOUSAND ($10,000.00) DOLLARS.

III.

Relief is sought under the provisions of the Federal Declaratory Judgment Act.

IV.

On September 3, 1964, Plaintiff executed and delivered his note payable to the Defendant in the Amount of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS. At that time Plaintiff executed a Collateral Pledge Agreement under the terms of which he pledged with the Bank as security for the repayment of the loan, 6,250 shares of Bank of Miami Beach stock, and in particular, Certificates No. A-1085 - 1097, inclusive.

V.

Thereafter, in an undated Notice of Sale, the Defendant sought to cause the sale on Tuesday, July 19, 1966, at the desk of Wayne Puls, President of the Defendant banking house, of the described certificates representing shares of stock of the Bank of Miami Beach.

A copy of that Notice is attached to the original complaint herein as Exhibit "A" and made part of this Amended Complaint.

VI.

It is the contention of the Plaintiff that the purported Notice of Sale was invalid in that the notice and

the mailing of the notice failed to comply with the provisions of Florida Statutes and Section 685.02 Laws of 1965 in particular, relating to the sale of collateral securities.

Plaintiff contends that the Defendant well knew that service to him through the mail could not reach him in time to permit the period prescribed by Florida Statutes Section 685.02 to be available to Plaintiff prior to the purported date of sale and intentionally and knowingly and wilfully, in an attempt to circumvent the requirements of the aforesaid Section 685.02, mailed the notice of sale, appending hereto as Exhibit "A" and in fact the aforesaid notice did not reach Plaintiff within the requisite time.

VII.

Plaintiff contends, contrary to the contention of the Defendant as reflected in its Notice of Sale, that the notice is improper under the Statute, is invalid under the Statute and, therefore, cannot permit the vesting of good title to the stock certificates at the sale.

VIII.

As a result of the difference of the positions of the parties, the Plaintiff finds that the unlawful and improper purported utilization of Section 685.02 Florida Statutes Laws of 1965 has imposed a purported sale of his stock certificates and that Plaintiff is in doubt and in jeopardy as to his rights and status in and to his title to the stock certificates secured from that sale.

The Defendant's position is in absolute controversy and contradiction to that of the Plaintiff and presents a real and substantial difference in the positions of the parties herein.

Inasmuch, therefore, as Plaintiff is without relief save and except in a Court of equity, Plaintiff prays:

1. That this Court take jurisdiction of this cause and of the parties herein.

2. That this Court declare by its appropriate decree that the Notice of Sale reflected in these proceedings is invalid and fails to conform to the requirements of Florida Statute Section 685.02.

3. That this Court grant such other and further relief as it may deem meet and proper.

Milton E. Grusmark
Attorney for Plaintiff
407 Lincoln Road
Miami Beach, Florida 33139

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Amended Complaint has been mailed to Norman P. Freedman, Attorney for Defendant, 1005 Florida Title Building, Jacksonville, Florida, this 9 day of December, 1966.

/s/ Milton E. Grusmark

Milton E. Grusmark

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

No. 66-516-Civ-J

BENJAMIN COHEN,

Plaintiff,

-vs-

CENTRAL NATIONAL BANK OF JACKSONVILLE, a National banking institution chartered under the laws of the United States,

Defendant.

ANSWER

Defendant admits the allegations of paragraphs 1, 2, 3, 4 and 5 of Plaintiff's Amended Complaint, and Defendant denies each and every other allegation of Plaintiff's Amended Complaint not herein specifically admitted.

And for further answer to the Amended Complaint, Defendant alleges that the subject matter of the controversy, to-wit, the 6,250 shares of Bank of Miami Beach stock, has been sold to Jack Carner and by reason thereof is not within the care, custody or control of this Defendant and that this action is moot.

NORMAN P. FREEDMAN
1005 Florida Title Building
Jacksonville, Florida 32202
Attorney for Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

Before me, the undersigned authority, personally appeared NORMAN P. FREEDMAN, who, being by me first duly sworn, deposes and says that he is attorney for the Defendant in the above entitled cause; that on the 23rd day of March, A. D. 1967, Affiant mailed a copy of the foregoing Answer to Milton E. Grusmark and Irwin Oster, Attorneys for Plaintiff, 407 Lincoln Road, Miami Beach, Florida 33139, by depositing it in a United States Mail Box in Jacksonville, Florida, in an envelope securely sealed and addressed to said attorneys, at the address aforesaid, with sufficient postage to insure delivery to said addressees.

Norman P. Freedman

Sworn to and subscribed before me this 23rd day of March, 1967.

/s/ Natalie P. Pittman

Notary Public, in and for State of Florida at large.

My Commission Expires: Aug. 16, 1969.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 66-516-Civ-J

BENJAMIN COHEN,

Plaintiff,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE,
a national banking institution chartered under
the laws of the United States,

Defendant.

DECLARATORY JUDGMENT

After the pre-trial stipulations the Court needs only to consider one matter to dispose of this case. This action involves a 1964 pledge of securities as collateral for a loan made by the defendant to the plaintiff. In 1966 the defendant demanded repayment from the plaintiff and upon failure of the plaintiff to respond with payment, defendant, pursuant to Florida Statutes § 685.02 (this section has since been repealed by the enactment of the Uniform Commercial Code in Florida), gave 10 days notice to plaintiff of the sale of the pledged securities. On July 19, 1966, the securities were sold.

The parties stipulated that the Florida Rules of Civil Procedure, 1965 Revision, were in effect at the time the operative facts occurred.

It is the contention of the plaintiff here that the Florida Rules of Civil Procedure, 1965 Revision, Rule

1.6(e) affect the notice provisions of Florida Statutes § 685.02 by requiring three additional days notice beyond the 10 days required by the statute. The parties stipulated that the defendant gave the plaintiff 10 days notice, but not the 13 days notice, that plaintiff claims is necessary before sale.

Florida Rules of Civil Procedure, Rule 1.6(e), 1965 Revision, reads in full:

> "(e) Additional Time After Service by Mail.
>
> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period".

As authority for the proposition that this section of the Florida Rules of Civil Procedure amends the notice provisions of the statute, plaintiff cites the per curiam opinions of the Supreme Court of Florida which approve and adopt the Rules. Those orders read as follows:

> " IN THE SUPREME COURT OF FLORIDA
> JANUARY TERM, A.D. 1962
>
> "IN RE: FLORIDA RULES OF CIVIL PROCEDURE 1962 REVISION
>
> "Opinion filed June 20, 1962
>
> "PER CURIAM.
>
> "Appended to this order is a complete compilation of the Florida Rules of Civil Procedure and all amendments, revisions or additions which have been made since July 1, 1957, adopted pursuant

to the power vested in this Court by Article V of the Florida Constitution. This compilation and revision shall govern all proceedings within the scope of these rules after midnight September 30, 1962. This compilation and revision shall supersede all conflicting rules and statutes. All statutes not superseded hereby or in conflict herewith shall remain in effect as rules promulgated by the Supreme Court.

"Adopted and approved by the Court en banc June 18th, 1962.
"It is so ordered.

"IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1965

"IN RE: FLORIDA RULES OF CIVIL PROCEDURE 1965 REVISION CASE NO. 33,800

"Opinion filed July 28, 1965

"PER CURIAM.

"The attached amendments to the Florida Rules of Civil Procedure are hereby approved and adopted, the same to take effect on 1 January 1966. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending. All rules, parts of rules, statutes or parts of statutes inconsistent with the amendments hereby approved and adopted are hereby repealed.

"THORNAL, C.J., THOMAS, ROBERTS, DREW, O'CONNELL, CALDWELL and ERVIN, JJ., Concur"

Plaintiff's argument has a fatal defect. It is elementary that the Court has the power to establish rules and regulations governing the conduct of lawsuits filed in the courts. Equally elementary is the fact that the Legislature was designed to establish general laws, while the judiciary was established for the vindication of individual rights. With these principles in mind, it is obvious that "party", as used in Rule 1.6(e) of the Florida Rules of Civil Procedure means a party to a lawsuit. If that word was given a broader meaning to include parties to non-judicial, as well as judicial, proceedings, it is apparent that the Court would be attempting to proscribe rules in an area appropriately in the legislative sphere. Certainly the Supreme Court of Florida did not mean to interfere with the regulations established by the Florida Legislature for such non-judicial proceedings as the sale of collateral securities. Cf. *In Re McRae's Estate*, 73 S. 2d 818 (Fla. 1954); *Leithauser v. Harrison*, 206 S. 2d 222 (Fla. 4th Dist. 1968).

In view of the foregoing discussion, it is, therefore,

ORDERED AND ADJUDGED:

That this suit is dismissed, with prejudice, and at the cost of the plaintiff.

DONE AND ORDERED at Jacksonville, Florida, this 29th day of August, 1969.

/s/ Charles R. Scott

Judge

CC Milton E. Grusmark, Esquire
Mrs. Natalie Baskin
James M. McLean, Esquire

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28918

Summary Calendar

BENJAMIN COHEN,

Plaintiff-Appellant,

versus

CENTRAL NATIONAL BANK OF JACKSONVILLE, etc.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(August 13, 1970)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: This appeal involves the notice which a creditor under Florida law must give a pledgor before selling pledged collateral.[1] It appears that the plain-

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[1]Pursuant to our Rule 18 this case is decided without oral argument.

tiff, Benjamin Cohen, borrowed $100,000 from the Central National Bank of Jacksonville, pledging certain shares of stock as security for this loan. In 1966 the Bank demanded repayment of the loan. Cohen did not repay the loan as requested. The Bank then notified Cohen by registered mail as then authorized by a Florida statute[2] that the stock would be sold. The stock was apparently sold 10 days after notice was mailed, and Cohen instituted this proceeding against the Bank for a declaratory judgment that the sale was invalid. Cohen's argument was that under the Florida law applicable in 1966 a sale was not valid if it occurred less than 13 days after the notice of sale was mailed to the pledgor. The court below rejected Cohen's argument, holding that the sale was valid even though it occurred less than 13 days after the notice was mailed. We agree.

Section 685.02[1] of the Florida statutes provided in part:

> "SALE OF COLLATERAL SECURITIES. In all cases in which any stock in a corporation, contract, obligations, security or evidence of indebtedness, shall be pledged or deposited as security for the payment of any indebtedness, the person or corporation to whom the same may be pledged, hypothecated or transferred, and their assigns, may sell the same in such manner and on such terms as may be agreed upon in writing by the parties at the time of making the pledge,

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[2]Fla. Stat. Ann. § 685.02. See note 3 infra.

[1]Fla. Stat. Ann. § 685.02 was repealed in 1965 effective January 1, 1967. Section 685.02 was therefore applicable to the sale in question here, which occurred in 1966.

> or thereafter, and such sale shall vest in the purchaser or purchasers the title in and to said pledges, collaterals or securities; provided ten days' notice of said sale be given to the pledgor or his legal representative by personal delivery or by registered mail addressed to the pledgor at the address given by him to the pledgee for that purpose, such period of notice to begin to run from the date of such personal delivery or from the date of posting if such notice is given by registered mail. . . ."

Cohen argues, however, that Rule 1.6(e), Fla. R. Civ. P. (1954), added three days to the 10-day requirement of § 685.02 if the registered mail procedure authorized in that section was used. Rule 1.6(e)[4] provided:

> "(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

We find Cohen's argument without merit. Rule A,[5] Fla. R. Civ. P. (1954) provided:

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[4]Rule 1.6(c) was renumbered in 1967. The substance of Rule 1.6(e) is now found in Rule 1.090(e), Fla. R. Civ. P. (1967).

[5]Rule A was revised in 1967. The substance of Rule A now appears in Rule 1.010, Fla. R. Civ. P. (1967).

> "These rules are applicable to all suits of a civil nature and all special statutory proceedings in the Circuit Courts, County Judge's Courts, County Courts, and Civil Courts of Record, whether recognizable as cases at law or in equity, with the exception that the form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes providing for such proceedings, unless these rules shall specifically provide to the contrary. These rules shall be construed to secure the just, speedy and inexpensive determination of every action."

We think it obvious from the above that Rule 1.6 was designed to apply to parties to a judicial proceeding. We cannot see how it could have any application to the sale of pledged collateral, which is a non-judicial proceeding. The parties have stipulated that Cohen received the 10-day notice provided in § 685.02. This was all that was required under the circumstances.

The decision of the district court holding the sale valid is AFFIRMED.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

NO. _____

October Term, 1970

BENJAMIN COHEN,

Petitioner,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE, ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same hereby, extended to and including November 25th, 1970, without prejudice to the Court's consideration as to whether this application has been filed in time.

/s/ Hugo L. Black

Associate Justice of the Supreme Court of the United States

Dated this 16th day of November, 1970.

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DEC 21 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1007

BENJAMIN COHEN,

Petitioner,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

DAVID M. FOSTER
Attorney for Respondent
1300 Florida Title Building
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APPENDIX A

Application for Extension of Time in which to File Petition for Writ of Certiorari App. 1

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO._____

BENJAMIN COHEN,

Petitioner,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

WHEN A FLORIDA STATUTE REQUIRES TEN DAYS' NOTICE TO BE GIVEN BEFORE SECURITIES, WHICH ARE HELD AS COLLATERAL, ARE SOLD BY A BANK, DO THE FLORIDA RULES OF CIVIL PROCEDURE APPLY TO REQUIRE AN ADDITIONAL THREE DAYS' NOTICE WHEN NOTICE IS SENT BY REGISTERED MAIL, TO INSURE DUE PROCESS AND EQUAL PROTECTION UNDER THE LAWS?

STATEMENT OF THE CASE

The Respondent accepts Petitioner's statement of the case.

REASONS FOR NOT GRANTING THE WRIT

A. Petition Not Timely Filed

The Petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should not be granted since it was not timely filed.

The judgment of the United States Court of Appeals for the Fifth Circuit in this case was entered on August 13, 1970. Supreme Court of the United States Rule 22.3 provides that:

> "A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law."

Title 28 U. S. C. A. Section 2101 (c) provides that:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety (90) days after the entry of such judgment of decree. A justice of the Supreme Court, for good cause shown, may expend the time for applying for a writ of certiorari for a period not exceeding sixty (60) days."

In order for Petitioner's petition for writ of certiorari to have been timely filed, without extension, it would have to have been filed on November 11, 1970, in accord with Supreme Court of the United States Rule 34.1. Instead it was filed on November 24, 1970.

On November 10, 1970, the Petitioner filed an "Application for Extension of Time in Which to File Petition for Writ of Certiorari." A copy of this application appears in Appendix A. This application was made one day prior to the deadline for filing the Petition for Writ of Certiorari in this case.

On November 16, 1970, Mr. Justice Black entered an order granting until and including November 25, 1970 for filing petition for a writ of certiorari, without prejudice to

the Court's consideration as to whether the application was filed in time. Mr. Justice Black's order was granted pursuant to Supreme Court of the United States Rule 34.2 which provides in part that:

> "Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period."

The Respondent submits that the Petitioner's application for extension of time in which to file his petition for writ of certiorari was made during the last ten days of the period sought to be extended. Indeed, it was made on the very last day prior to the expiration of the period.

Respondent further submits that the Petitioner has not shown the extraordinary circumstances which would justify the extension of time in which to file the petition for writ of certiorari in this action pursuant to Supreme Court of the United States Rule 34.2.

B. Argument

Rule 1.6(e), of the 1954 Florida Rules of Civil Procedure did not extend the ten days' notice of sale prescribed in Section 685.02, Florida Statutes, 1965, as contended by Petitioner, because the 1954 Florida Rules of Civil Procedure are applicable only to lawsuits of a civil nature and all special statutory proceedings in the Circuit Courts, County Judge's Courts, County Courts and Civil Courts of Record. Whereas, section 685.02 applied to the non-judicial sale of collateral securities.

Rule A of the 1954 Florida Rules of Civil Procedure is set forth below:

> "Scope and Title of Rules. These rules are applicable to all suits of a civil nature and all special statutory